United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,114

CALVIN C. ANDERSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

990

ON APPEAL FROM THE DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. Does the right to counsel guaranteed by the Sixth Amendment apply at arraignment? If so, is such right lost because the accused pleads not guilty?

2. Is the denial of a pretrial motion to suppress res judicata or "law of the case" and, therefore, a bar to an independent determination by the trial judge of the validity of the arrest and ensuing search under the Fourth Amendment to the U. S. Constitution? In addition, there are two related questions which go to the fairness of appellant's trial:

(a) Was defendant denied a fair trial where the trial judge, believing that denial of a pretrial motion to suppress foreclosed the issue, impeded and limited counsel's attempt to establish the unconstitutionality of appellant's arrest and ensuing search?

(b) Could the trial Judge, who believed that denial of a pretrial motion to suppress foreclosed the issue, make an independent, open-minded and fair determination of appellant's claim that evidence should be excluded as the fruit of an unconstitutional search and seizure?

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JURISDICTIONAL STATEMENT

The judgment of the District Court was entered November 30, 1964, and notice of appeal was filed December 9, 1964. On the same day, the District Court authorized appellant to proceed on appeal in forma pauperis. This Court has jurisdiction of the appeal under 28 U.S.C. §1291.

STATEMENT OF THE CASE

On August 31, 1964, an indictment was returned charging appellant with two narcotics violations. [1] After trial without a jury, the court imposed concurrent sentences of twenty months to five years and five years. The relevant facts are as follows:

On September 3, 1964, the district court appointed a lawyer to appear and defend on appellant's behalf. This lawyer never participated in the proceedings, and the following day appellant appeared for arraignment without counsel and entered a plea of not guilty. A week later, still without counsel, he filed a pro se motion to suppress evidence claiming (1) that he had been arrested and searched without probable cause in violation of the Fourth Amendment, and (2) that the evidence should be suppressed because the capsules found in his possession contained "milk sugar -- and only milk sugar." [2] Appellant also filed a pro se motion for a

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1/ The first count charged that he had purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, narcotic drugs, in violation of 26 U.S.C. 4704(a); the second count charged that he had facilitated the concealment and sale of narcotic drugs, in violation of 21 U.S.C. §174.

2/ The second ground was not only superfluous and patently untenable, but, as will be shown below, potentially prejudicial.

bill of particulars seeking documents and information which he stated were necessary in order "to properly prepare an adequate defense." Neither of appellant's pro se motions was accompanied by a supporting memorandum of law.

On September 17, 1964, counsel originally appointed by the court was relieved of his assignment and new counsel was appointed. On October 9, 1964, appellant's new attorney appeared before Judge Matthews to present the motions for bill of particulars and suppression of evidence (M/S Tr. 3).[3/] Judge Matthews granted the motion for a bill of particulars in part and denied it in part. She did not rule on the motion to suppress but continued the hearing to the following week so that a second arresting officer could testify (M/S Tr. 27).

At the initial hearing on the motion to suppress, Officer Poppen testified that on the evening of the arrest he and his partner, Officer Porter, had observed a large group of men (about 11 or 12) fighting and causing a disturbance. As the police approached, the crowd dispersed. All except appellant ran away from the police and were not apprehended; appellant ran toward the police and was arrested for disorderly conduct (M/S Tr. 4-6, 13-14).

3/ The transcript of the hearing on the motion to suppress will be cited "M/S Tr. __"; the trial transcript will be cited "Tr. __."

Immediately after the arrest, Officer Porter searched appellant and found a brown bag containing some capsules in his left front pocket (M/S Tr. 8-10). Appellant was then taken to the police station where a further search disclosed a brown piece of paper wrapped around 14 cellophane envelopes containing a white substance (M/S Tr. 10). According to Officer Poppen, neither he nor Officer Porter had ever before seen appellant (M/S Tr. 7, 12-13).

Appellant then testified that at the time of his arrest he had just come out of a restaurant and was alone. He denied participating in a fight and stated that he had been running to get out of the rain. According to appellant, the police told another policeman in an Accident Investigation Unit car that they had a "dope case" and instructed him to "call the wagon." When the patrol wagon came, one of the officers in it advised the arresting officers to "charge him with disorderly conduct to give you probable cause for searching him" (M/S Tr. 18-19). On re-direct examination, appellant testified that Officer Porter had stopped him twice before, and knew him by name (M/S Tr. 23).

When the hearing resumed a week later, Officer Porter took the stand and told, in general, the same story as Officer Poppen (M/S Tr. 30-39). He and Poppen had arrested appellant because they had seen him engaged in a loud and disorderly melee with 10 or 12 other men (M/S Tr. 30-31). A search at

the time of arrest disclosed a brown paper bag and a package of Kool cigarettes both of which contained a white powder (M/S Tr. 33). He denied that to his knowledge he had ever before stopped and questioned appellant (M/S Tr. 37).

At the close of Officer Porter's testimony, Judge Matthews denied the motion to suppress (M/S Tr. 42).

At the trial before Judge Holtzoff, appellant waived a jury since his only defense was that there had not been probable cause for the arrest (Tr. 3). Officers Porter and Poppen testified as to the circumstances of the arrest and search, and except for a few discrepancies, [4/] told about the same story as before (Tr. 8-35, 35-50). Appellant's counsel cross-examined Officer Porter without undue interference concerning the lack of probable cause for arrest (Tr. 17-35).

The complexion of the trial changed abruptly, however, when, early in the cross-examination of Officer Poppen, the

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4/ For example, at the hearing on the motion to suppress, Officer Poppen testified that appellant was in the middle of the group "just fighting generally with the crowd" (M/S Tr. 6, 15). At the trial, he testified that appellant was "in a scuffle with another Negro male" (Tr. 37). Officer Porter not only had appellant fighting with just one other person but placed him on the north side of the group rather than in the middle (Tr. 24). Further, at the hearing on the motion to suppress, Officer Poppen testified that appellant wore "a light coat, [and] dark trousers" but could not recall the color of his shirt. At the trial, Officer Poppen did not mention the light coat and stated, without hesitation, that he had worn a red shirt (M/S Tr. 15; Tr. 37, 45).

court learned that a motion to suppress had been denied by Judge Matthews. "I think," the court declared,

> Judge Matthews' ruling is binding on me. Otherwise we might as well abolish motions to suppress (Tr. 45).

While the court purported to allow counsel to proceed, after about 10 questions, he interrupted:

THE COURT: Mr. Johnson, all this issue was tried out before Judge Matthews, wasn't it?

MR. JOHNSON: Well, at the hearing before Judge Matthews we went into the question of whether or not these officers had probable cause to make this arrest. (Tr. 46-47)

The court, though still under the impression that he was foreclosed by Judge Matthews' ruling, again said that counsel could "finish as though that motion had not been decided . . ." He told counsel, however, that "you better abbreviate this . . . in view of the fact all this has been thrashed out before." (Tr. 47-48). When counsel then tried to explain that he had not gone into as much detail at the pretrial hearing, the court retorted: "But you had a right to do it. You can't have two bites of a cherry." Counsel's attempted response was cut off by the court (ibid.), and he then tried to proceed with cross-examination.

After counsel asked three more questions, the court adjourned for the mid-afternoon recess (Tr. 48-49). At the end of the recess, the court once again instructed counsel to "make it very brief" (Tr. 49). Counsel then attempted to ask

Officer Poppen about the condition of the weather, a relevant fact in view of appellant's contention that he had been running in order to get out of the rain. Without objection from the prosecutor, the court excluded the question (ibid.). Counsel then asked Officer Poppen to state whether he had had prior occasion to see this defendant or to stop him on the street. This question also was excluded by the court, sua sponte, as irrelevant and beyond the scope of the direct examination (ibid.). Counsel thereupon terminated his cross-examination (Tr. 50).

Other testimony adduced by the Government was primarily technical for the purpose of identifying the capsules seized from appellant and establishing that they contained narcotics (Tr. 50-59). Appellant then took the stand and testified, as he had in the hearing on the motion to suppress, that he had not been fighting but was by himself, running to get out of the rain (Tr. 59-61).

Suspending for the moment his belief that the question was no longer open, Judge Holtzoff purported to weigh the evidence. Believing the police rather than appellant, he concluded that there was a reasonable basis for an arrest, and, therefore, that the search was valid (Tr. 63-64). He went on to say, however, that he did not think the question was open since "the decision of Judge Matthews denying the motion to suppress is res judicata." (Tr. 64-65).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 41(e), Federal Rules of Criminal Procedure, provides as follows:

> (e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT OF POINTS

1. The right to counsel guaranteed by the Sixth Amendment applies throughout a criminal proceeding, beginning at least at the arraignment stage and continuing thereafter through pretrial and trial.

2. The denial of a pretrial motion for suppression of evidence under Rule 41(e) is not res judicata or otherwise binding upon the trial judge, and the question whether a search and seizure is unconstitutional under the Sixth Amendment may be raised anew at the trial.

3. One is denied his constitutional right to a fair trial where the trial judge,

(a) limits the presentation of an issue because of an erroneous impression that such issue is foreclosed as a matter of law; and

(b) though purporting to decide a question, has, in fact, prejudged it on the basis of an erroneous interpretation of the law.

SUMMARY OF ARGUMENT

I

A. The Sixth Amendment requires that the assistance of counsel be provided "at every step in the proceedings." Johnson v. Zerbst, 304 U.S. 458, 463 (1938). While this requirement has repeatedly been held applicable to arraignment, this Court,

more than 15 years ago, said that "[t]here is no constitutional requirement that the accused be represented by counsel on arraignment where he pleads not guilty." Council v. Clemmer, 85 U.S. App. D.C. 74, 75, 177 F. 2d 22, 23 (1949), cert. denied 338 U.S. 880. This dictum has been rendered obsolete by subsequent Supreme Court decisions and, moreover, is intrinsically untenable.

B. In Hamilton v. Alabama, 368 U.S. 52, 53-55 (1961), the defendant, unrepresented by counsel, had pleaded not guilty at arraignment. The Supreme Court, without stopping "to determine whether prejudice resulted," held that such denial of counsel required reversal because under Alabama law arraignment "is a critical stage in a criminal proceeding." Subsequently, in White v. Maryland, 373 U.S. 59 (1963), the Court confirmed that "the rationale of Hamilton v. Alabama, supra, does not rest . . . on a showing of prejudice." The same disposition to vindicate constitutional rights without inquiry as to whether prejudice actually resulted is manifested in Gideon v. Wainwright, 372 U.S. 335 (1963), in which the Court discarded the "special circumstances" rule under which the right to counsel in state proceedings had previously depended on a showing of prejudice.

C. The Constitution's guarantee of effective assistance of counsel is not satisfied unless a lawyer is provided at least

by the time of arraignment. This is established not only by the Supreme Court decisions referred to above but also by analysis of the practical importance, particularly to an indigent, of having a lawyer at the arraignment itself and during the critical post-arraignment period. At the arraignment, a lawyer's judgment and skill are needed to decide how to plead, to argue for a reduction in bail, to make Rule 12(b) motions, and, where appropriate, to determine whether the right to a grand jury should be waived. Furthermore, if counsel has not been provided by the time of arraignment, then the defendant will continue to be unrepresented for some period of time thereafter, with any number of adverse consequences. Uncounseled, the defendant may make damaging statements or admissions or, as was done in this case, may file inept pro se pleadings which could irreparably damage the defense; the entire process of preparing the defense will be delayed; witnesses may disappear; there may be damaging delay in securing a mental examination; and even if, in the final analysis, such delay did not prejudice the defense, the total period of incarceration would be extended because the defendant was unable to afford, and was not promptly provided with, counsel.

D. In Johnson v. Zerbst, supra, the Supreme Court made clear that where the "requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed." 304 U.S. at 468. Accordingly, the proper remedy in

this case is to set aside the conviction and nullify all prior proceedings subsequent to indictment.

II

The only issue at the trial was whether the police had probable cause to arrest appellant. Although the trial judge assumed that denial of a pretrial motion to suppress evidence was res judicata and foreclosed this issue, he purported to decide it as if it were open. In fact, the trial judge was wrong as a matter of law, and this error fatally infected the trial.

A. It is well established that pretrial rulings on motions to suppress evidence are "interlocutory, not final and independently appealable, and hence not res judicata." Nelson v. United States, 93 U.S. App. D.C. 14, 25, 208 F. 2d 505, 516 (1953). They absolutely do not foreclose later consideration of the matter at the trial. "[A]lthough the preliminary motion was denied, the objection made at the trial to the admission of the evidence may be sustained." Cogen v. United States, 278 U.S. 221, 224 (1929). Finality should not be given to such rulings "because the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light." DiBella v. United States, 369 U.S. 121, 129 (1962); see also, Gouled v. United States, 255 U.S. 298, 312-13 (1921).

B. This Court's prior decisions in Waldron v. United States, 95 U.S. App. D.C. 66, 70, 219 F. 2d 37, 41 (1955) and Jennings

v. United States, 101 U.S. App. D.C. 198, 199, 247 F. 2d 784, 785 (1957) do not support the district court's interpretation of the law. In Waldron, this Court observed that the pretrial ruling becomes a controlling rule in the case similar to a ruling made during the trial. At the same time, however, it clearly recognized that the objection may, and indeed should, be renewed at the trial, and that, as a practical matter, the pretrial ruling may be reversed during trial. In Jennings, where, as here, Judge Holtzoff had expressed the view that after denial of a pretrial motion to suppress, "the objection may not be renewed at the trial," this Court affirmed without in any way approving or endorsing that principle of law. Such affirmance was based on the fact that the trial judge, notwithstanding his belief that the issue was foreclosed, had permitted appellant's counsel to present and argue the question fully and had made an independent review of the evidence.

(i) Here, while the trial judge purported to permit appellant to proceed with the unlawful arrest defense, in fact, he erected insurmountable roadblocks to appellant's presentation by repeatedly interrupting, by admonishing counsel to "abbreviate" his questioning, and by excluding, sua sponte, clearly relevant lines of inquiry.

(ii) Furthermore, because of his belief that the prior ruling was res judicata, the trial judge "had in some measure

decided in advance that" appellant's unlawful arrest defense could not be sustained. Texaco, Inc. v. Federal Trade Commission, ___ U.S. App. D.C. ____, 336 F. 2d, 754, 760 (1964). This deprived appellant of a fair trial, for "no matter what the evidence was against him, he had the right to have an impartial judge." Tumey v. Ohio, 273 U.S. 510, 535 (1927).

ARGUMENT

I

APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE HE WAS ARRAIGNED WITHOUT COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT.

A. The Right to Effective Assistance of Counsel Guaranteed by the Sixth Amendment Applies at Arraignment.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In Johnson v. Zerbst, 304 U.S. 458, 463 (1938), the Supreme Court interpreted this to mean that an indigent accused of crime is entitled to be represented by court-assigned counsel "at every step in the proceedings against him." "If this requirement of the Sixth Amendment is not complied with," the Court further declared, "the court no longer has jurisdiction to proceed," and the "judgment of conviction pronounced by a court without jurisdiction is void." 304 U.S. at 468.

Arraignment is unquestionably a step in the proceedings for Sixth Amendment purposes. The Supreme Court so held in Walker v. Johnston, 312 U.S. 275 (1941), where it set aside

a conviction upon a guilty plea entered without the advice of a lawyer, and in Von Moltke v. Gillies, 332 U.S. 708, 723 (1948), where it held that "[a]rraignment is too important a step in a criminal proceeding" for perfunctory representation, and that "hollow compliance with the mandate of the Constitution at a stage so important as arraignment" will not be tolerated. (Emphasis added.) This Court, likewise, has held that the Sixth Amendment right to counsel applies at the arraignment stage. Evans v. Rives, 75 U.S. App. D.C. 242, 250, 126 F. 2d 633, 641 (1942); Edwards v. United States, 78 U.S. App. D.C. 226, 229, 139 F. 2d 365, 368 (1943). 5/

In 1949, in Council v. Clemmer, 85 U.S. App. D.C. 74, 75, 177 F. 2d 22, 23, cert. denied, 338 U.S. 880 (1949), this Court appeared to dilute the absolute right to counsel at arraignment recognized in the foregoing cases, stating that

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5/ Further recognition that the Sixth Amendment right to counsel attaches at arraignment came with the drafting and adoption of Rule 44, Federal Rules of Criminal Procedure, which "is a restatement of the principles enunciated in" Johnson v. Zerbst and cases following it. Advisory Committee Note 1 to Rule 44. The Rule provides:

> If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

Arraignment is normally the first time "the defendant appears in court" and the first "stage of the proceeding."

"[t]here is no constitutional requirement that the accused be represented by counsel on arraignment where he pleads not guilty." This assertion, however, is only dictum since it was "unnecessary to Council's holding that a conviction is not subject to collateral attack merely because counsel was absent during pretrial proceedings, unless that absence prejudiced the accused at trial." Ricks v. United States, ___ U.S. App. D.C. ___, ___, 334 F. 2d 964, 967 n. 2 (1964). Moreover, this dictum, with its undue emphasis on prejudice, would appear to be fundamentally inconsistent with the doctrine that "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 75-6 (1942). In any event, such validity as it may once have had has been undermined by the Supreme Court's recent decisions in Hamilton v. Alabama, 368 U.S. 52 (1961) and White v. Maryland, 373 U.S. 59 (1963), which, as this Court has pointed out, "cast doubt on the Council dicta that a lawyer is necessary only if a defendant pleads guilty." Ricks v. United States, supra. Finally, this Court's readiness to reconsider the Council dictum is perhaps further indicated by the reference to the Hamilton and White decisions in the order appointing the undersigned as counsel in this appeal.

In the following sections of this brief, we shall show that repudiation of the Council dictum is required by the

Hamilton and White decisions, and by analysis of the many ways in which an indigent may be prejudiced as a direct result of arraignment without counsel, even though a not guilty plea is entered.

B. Recent Supreme Court Decisions Conclusively Demonstrate that Denial of Counsel at any Critical Stage, Including Arraignment, is Unconstitutional, Regardless of Whether Actual Prejudice Results.

In Hamilton v. Alabama, supra, the Supreme Court for the first time considered whether it is unconstitutional to arraign a defendant without counsel, even though he pleads not guilty and has the effective assistance of counsel at later stages of the prosecution. The Supreme Court of Alabama denied relief because, as in Council, there "was no showing or effort to show that petitioner was 'disadvantaged in any way by the absence of counsel when he interposed his plea of not guilty.'" 368 U.S. at 53. The United States Supreme Court, however, did "not stop to determine whether prejudice resulted" (368 U.S. at 55), but held that the denial of counsel was unconstitutional simply because under Alabama law arraignment "is a critical stage in a criminal proceeding." 368 U.S. at 53, 54. While the Court judiciously declined to pass upon the importance of arraignment in other states, it left no doubt that it considers arraignment to be "a critical stage" in the federal system (368 U.S. at 54 n. 4):

> Under federal law an arraignment is a sine qua non to the trial itself--the preliminary stage where the accused is informed of the indictment

and pleads to it, thereby formulating the issue to be tried.

Subsequently, in Gideon v. Wainwright, 372 U.S. 335 (1963), the Court held that the Sixth Amendment's absolute guarantee of representation by counsel at every step in criminal proceedings "is made obligatory upon the States by the Fourteenth Amendment." 372 U.S. at 342. The constitutional right to counsel in state criminal proceedings, the Court held, does not depend upon whether a capital offense is charged or upon the existence of "special circumstances" indicating that the accused was prejudiced by lack of legal representation. One month later, in White v. Maryland, 373 U.S. 59, 60 (1963), the Court confirmed that "the rationale of Hamilton v. Alabama, supra, does not rest . . . on a showing of prejudice."

Thus, under these decisions there is an unqualified right to counsel at a federal arraignment--"a sine qua non to the trial itself"--without regard to prejudice or the lack thereof. Moreover, to paraphrase the language of the Supreme Court in Gideon, "[n]ot only these precedents but also reason and reflection require us to recognize that" from at least the moment a defendant appears in court for arraignment "lawyers . . . are necessities, not luxuries." 372 U.S. at 344.

C. A Failure to Provide Counsel at Least by the Time of Arraignment Can Prejudice the Accused Even When a Not Guilty Plea is Entered.

The rationale for the Council dictum is that "[n]othing

of substance prejudicial to a defendant occurs upon the making of that plea." 85 U.S. App. D.C. at 76, 172 F. 2d at 24. Not only has this assumption become untenable as a matter of law in light of subsequent Supreme Court pronouncements, but it is erroneous factually as well. As will next be shown, even where a not guilty plea is entered, there are countless ways in which a lawyer can be of assistance, not only at arraignment itself but during the crucial post-arraignment period.

(1) Counsel Has a Critical Role to Play at the Arraignment Itself.

In Evans v. Rives, supra, this Court held that the Sixth Amendment right to counsel applies at arraignment.

> The constitutional guarantee makes no distinction between the arraignment and other stages of criminal proceedings in respect of the application of the guarantee. As said in the statement quoted from Johnson v. Zerbst, "'If charged with crime, he [the accused] is incapable, generally, of determining for himself whether the indictment is good or bad. . . . He requires the guiding hand of counsel at every step in the proceedings against him.'" (Court's italics.) 75 U.S. App. D.C. at 250, 126 F. 2d at 641.

At arraignment, counsel's "guiding hand" is needed to assist defendant in determining whether to plead not guilty, guilty or nolo contendere, for only a lawyer can intelligently assess the validity of the arrest, the sufficiency of the indictment, the admissibility of a confession, the weight of the evidence, the strength of a defense, the possibility of leniency, and a myriad of other factors relevant in determin-

ing how to plead. Furthermore, only a lawyer can effectively bargain with a prosecutor for permission to enter an uncontested nolo plea, or to plead guilty to a lesser offense. If, as is true in many -- perhaps most -- criminal cases, it is in defendant's interest to plead guilty, he should have the opportunity to do so at the earliest moment.

In addition to advising defendant how to plead, a lawyer has other important functions to perform at arraignment. He can argue for a reduction in the amount of bail or for a release upon personal recognizance. Where a defendant charged with an offense punishable by imprisonment is arraigned upon an information, a lawyer is needed to determine whether he should insist upon his constitutional right to a grand jury, or should waive that right in the interest of expediting the proceeding against him. Finally, a lawyer's judgment and skill are required to determine whether to file a motion to dismiss under Rule 12(b) or a motion for transfer under Rule 21, and to prepare and argue these motions if they are deemed advisable. These are motions which may be made as a matter of right at or before arraignment; thereafter, they may be filed only if the court permits. Rules 12(b)(3) and 22, Federal Rules of Criminal Procedure. True, judges have discretion to entertain such motions after arraignment, but an indigent's rights ought not depend upon judicial discretion when a rich defendant's rights do not.

(2) Counsel Has a Critical Role to Play in the Post-Arraignment Period.

Thus far, we have focused upon the vital role that a lawyer plays in the arraignment itself. To stop here, however, would be to take too narrow a view of the right to counsel guaranteed by the Sixth Amendment. The statement that the accused "requires the guiding hand of counsel at every step in the proceedings against him," does not merely mean that he must have an attorney at his side during formal court appearances; rather, it means that he is entitled to effective legal assistance throughout the proceedings, beginning with the very first stage. Thus, it is important to recognize that the failure to provide counsel by the time of arraignment can result in serious prejudice to defendant after as well as during arraignment. For example:

(a) Defendant may file inadequate and damaging pro se motions. This danger is exemplified by the record in the present case. Immediately after arraignment, appellant filed pro se motions for a bill of particulars and for suppression of evidence. Neither motion was accompanied by an affidavit or a legal memorandum. The motion to suppress, moreover, contained the highly incriminating and entirely unnecessary statement that the capsules found in his possession contained "milk sugar -- and only milk sugar." This potentially damaging admission became a part of the record in this case.

Not infrequently, individuals accused of offenses committed in the District of Columbia are arrested and searched

in other districts. In such cases, Rule 41(e) permits motions to suppress to be made both in "the district in which the property was seized" and in "the district where the trial is to be had," or in either district. The decision as to where the motion should be filed may have legal significance and should be made by a lawyer.

(b) Witnesses for the defense may disappear before counsel is appointed and can commence an investigation. In many cases those who may testify on behalf of an indigent defendant are not persons of fixed address and cannot be traced once they have moved. The typical indigent, unable to purchase a bail bond, has no way of contacting these witnesses until a lawyer is assigned. Every day that a defendant spends in jail without legal assistance increases the probability that he will not have an adequate defense. And if witnesses are no longer available when defense counsel finally appears, the subpoena rights afforded by the Federal Rules are a mere form of words so far as the indigent defendant is concerned.

(c) Incarceration may be unnecessarily prolonged by the failure to provide counsel at arraignment. The failure to provide counsel by the time of arraignment means unnecessary delay in filing motions which may be dispositive, such as motions to dismiss or motions to suppress the only evidence in the case; delay in sending the defendant to St. Elizabeths for the 90 days mental examination essential in preparing an

insanity defense; delay in filing the motions which ordinarily must be made before arraignment; and postponement of the trial so that late-appointed counsel can adequately prepare. All of the above will almost certainly mean longer incarceration resulting from delay in providing a lawyer. 6/ "[S]o far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between the loss of liberty for a short period and such loss for a long one." Evans v. Rives, 75 U.S. App. D.C. 242, 247, 126 F. 2d 633, 638 (1942).

Thus, the conclusion that there is a constitutional right to counsel at arraignment, even when a not guilty plea is entered, is compelled both by recent Supreme Court decisions and by a consideration of the consequences of failing to provide counsel at that stage. In the present case, the record establishes that appellant was unable to obtain counsel, and there is no finding that he elected to proceed without counsel. 7/ Nevertheless, the district court proceeded

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6/ Delay in pleading guilty or nolo contendere and in moving for a reduction in bail will likewise prolong incarceration.

7/ In Johnson v. Zerbst, 304 U.S. 458, 464 (1938), the Supreme Court stated that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights," and "we do not presume acquiescence in the loss of fundamental rights."

to arraign him without furnishing a lawyer and in so doing violated his Sixth Amendment rights.

D. The District Court Lost Jurisdiction when Appellant Was Arraigned Without Counsel in Violation of the Sixth Amendment.

In Johnson v. Zerbst, supra, the Supreme Court held (304 U.S. at 468):

> If the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court -- as the Sixth Amendment requires -- by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.

Here, the district court lost jurisdiction when appellant was arraigned without counsel in violation of his Sixth Amendment rights. Accordingly, the conviction must be set aside and all prior proceedings, commencing with the arraignment, nullified.

II

APPELLANT WAS DENIED A FAIR TRIAL BECAUSE OF THE TRIAL JUDGE'S ERRONEOUS BELIEF THAT DENIAL OF A PRETRIAL MOTION TO SUPPRESS IS RES JUDICATA AND BINDING.

[With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: 44-50; 64-65.]

The only issue at the trial was whether the police had probable cause to arrest appellant (Tr. 3). Midway in the trial, the court became aware that Judge Matthews had ruled against appellant on a Rule 41(e) motion (Tr. 44). His immediate and repeated reaction was that "Judge Matthews' ruling is binding on me"(Tr. 45), that a decision on a Rule 41 motion "is the law of the case" (Tr. 48) and "res judicata" (Tr. 65), and that the constitutional issue was not "open because another judge of this court tried the issue on a motion to suppress and denied the motion" (Tr. 64).

This view of the law is erroneous, and even though the trial judge purported to decide the question "as though it was open" (Tr. 64), the proceedings were so thoroughly infected by his misinterpretation of the law as to deprive appellant of his constitutional right to a fair trial.

A. The Trial Judge's Assumption that a Pretrial Ruling in a Rule 41 Motion is Res Judicata and Binding is Erroneous as a Matter of Law.

It is clear, first of all, that res judicata and "law of the case" do not apply. "[I]t is familiar law that only a

final judgment is res judicata as between the parties." Merriam Co. v. Saalfield, 241 U.S. 22, 28 (1916). Applying this principle to rulings on Rule 41 motions, this Court has held such rulings to be "interlocutory, not final and independently appealable, and hence not res judicata." Nelson v. United States, 93 U.S. App. D.C. 14, 25, 208 F. 2d 505, 516 (1953). "Law of the case" is no more applicable, for "it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of res judicata . . . ." United States v. United States Smelting Refining & Mining Co., 339 U.S. 186, 199 (1950).

Furthermore, contrary to the district court's erroneous assumption, the Supreme Court has consistently recognized that pretrial rulings on motions to suppress are not, and should not be, binding on the trial judge. Thus, in Cogen v. United States, 278 U.S. 221, 224 (1929), where denial of a post-indictment motion to suppress was held to be nonappealable, the Court emphasized that such rulings do not foreclose the question at the trial itself. "It is not true," the Court declared,

> that the decision on such a motion for the return of papers necessarily settles the question of their admissibility in evidence. If the motion is denied, the objection to the admissibility as evidence is usually renewed when the paper is offered at the trial. And, although the preliminary motion was denied, the objection made at the trial to the admission of the evidence may be sustained. (Emphasis added.)

In DiBella v. United States, 369 U.S. 121, 129 (1962), the Court characterized an order on a motion to suppress as "a disjointed ruling on the admissibility of a potential item of evidence in a forthcoming trial," and held that it did not have finality for purposes of appeal. In support of this holding, the Court observed:

> [A]ppellate intervention makes for truncated presentation of the issue of admissibility because the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light. (Emphasis added.)

We respectfully submit that the district court's position in this case is diametrically opposed to DiBella, for it would give determinative effect to a pretrial ruling made before all circumstances could be brought to light.

Finally, while there is a rule of practice which discourages interruption of the trial for the purpose of determining the manner in which evidence was obtained, this rule has little, if any, application here since the only issue at the trial was the validity of appellant's arrest and ensuing search (Tr. 3). Moreover, it is only a rule of practice and, unlike res judicata, does not bind the court. This is the clear holding of Gouled v. United States, 255 U.S. 298, 312-13 (1921), where the trial judge, acting under the rule of practice just referred to, treated the denial of a pretrial motion as conclusive. The Supreme Court reversed, saying:

> [W]here, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right. (Emphasis added.)

On the basis of the foregoing, we respectfully submit that appellant's counsel was well within his rights in renewing the search and seizure point at the trial. The issue remained open, and he should not have been foreclosed or impeded in presenting it to the court. As will next be shown, the prejudice resulting from the court's erroneous view of the law was not eliminated by his attempt to decide the question as though it were still open.

B. The Trial Judge's Erroneous View of the Law Infected the Trial Proceedings and Deprived Appellant of a Fair Trial.

Once before, in United States v. Jennings, 19 F.R.D. 311, 312 (D.D.C. 1956), Judge Holtzoff expressed the erroneous view "that a ruling denying a motion to suppress made before the trial under Rule 41(e) . . . becomes the law of the case and is binding on the trial court. The objection may not be renewed at the trial." This ruling appears to rest on certain dicta in Waldron v. United States, 95 U.S. App. D.C. 66, 70, 219 F. 2d 37, 41 (1955), to the effect that the pretrial ruling becomes a controlling rule in the case similar to a ruling

made during the trial, itself. [8/] Judge Holtzoff, however, took no notice of other relevant statements in this Court's opinion, e.g., that "[t]he movant has a right to renew his point" at the trial; that, though not required to do so, "it would be safer and more skillful to interpose an objection when the evidence is offered"; and that, while the pretrial ruling is analogous to one made during trial, "[o]f course a trial court may reverse itself on a point during trial . . ." Thus, while Waldron holds that it is not necessary to renew the point at trial, it clearly recognizes that it may, and indeed should, be renewed, and that, as a practical matter, the pretrial ruling may be reversed during trial.

In affirming the conviction in Jennings, this Court referred to -- but refrained from approving -- Judge Holtzoff's "impression that the pretrial denial constituted the controlling rule of the case . . ." Jennings v. United States, 101 U.S. App. D.C. 198, 199, 247 F. 2d 784, 785 (1957). While the conviction was upheld, this was on completely different grounds, namely, because the trial judge had "permitted the witnesses to testify at length as to the circumstances

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8/ The holding of the case -- that where a pretrial motion to suppress is made and denied, one is not required to renew the objection in order to preserve the point for appeal -- has no bearing on the issue presented in Jennings and this case.

surrounding the seizure," had "permitted appellant's counsel to argue fully the question of legality of the seizure," and had "reviewed the evidence bearing on the point" and concluded that the search and seizure were legal.

(i) The Trial Judge Unreasonably Limited Appellant's Cross-Examination.

Nominally, the trial judge permitted appellant to proceed with the unlawful arrest defense; in fact, as soon as he learned of Judge Matthews' pretrial ruling, the trial degenerated into a mere ritual. This is demonstrated by the attitude exhibited by the trial judge at each page of the transcript from the point where he first learned of Judge Matthews' ruling until counsel finally gave up his attempt to cross-examine the second arresting officer.

[Tr. 44]. The court, learning that Judge Matthews had denied a motion to suppress, inquires: "What is there open for me then?"

[Tr. 45]. Though believing that "Judge Matthews' ruling is binding on me," the court allows counsel to proceed.

[Tr. 46]. The court interrupts cross-examination to ask: "Mr. Johnson, all this issue was tried out before Judge Matthews, wasn't it?"

[Tr. 47]. The court reiterates his view "that a defendant is not entitled to two trials of the issue of lawfulness of an arrest . . ." but allows counsel to proceed "as though [the motion to suppress] had not been decided . . ." Counsel

is admonished, however, to "abbreviate this . . . in view of the fact all this has been thrashed out before."

[Tr. 48]. Counsel points out that he had not gone into as much detail at the pretrial hearing. The court responds: "But you had a right to do it. You can't have two bites of a cherry. However, you may proceed. The rule is a decision on a motion to suppress made under Rule 41 . . . is the law of the case . . ." Counsel's attempt to argue further is cut off by the court. Three questions later, the court suspends for mid-afternoon recess.

[Tr. 49]. On returning to court, counsel is met with the following reception: "Any more questions? I hope you will make it very brief." At it happened, the ensuing cross-examination was extremely brief, for the court, without objection by the United States Attorney, excluded sua sponte the only two additional questions counsel attempted to ask. The first concerned the condition of the weather, a relevant question in view of appellant's contention that he had been running in order to get out of the rain. The second question was whether the arresting officer had previously seen appellant or had occasion to stop him on the street. This, too, was obviously relevant, for an affirmative answer could have provided a basis for showing that appellant was arrested as a known narcotics user rather than for his alleged participation in a street fight.

[Tr. 50]. Counsel terminates his cross-examination of the arresting officer.

(ii) The Trial Judge Prejudged the Issue.

In Texaco, Inc. v. Federal Trade Commission, ___ U.S. App. D.C. ___, 336 F. 2d 754 (1964), this Court made clear that personal hostility or financial interest are not the only bases upon which one may be disqualified as an impartial arbiter; one is also disqualified if "a disinterested observer may conclude that [he] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." ___ U.S. App. D.C. at ___, 336 F. 2d at 760, quoting from Gilligan, Will & Co. v. Securities & Exchange Commission, 267 F. 2d 461, 469 (2d Cir. 1959). And, as Judge Washington pointed out in his separate opinion in Texaco, "Once an adjudicator has taken a position apparently inconsistent with an ability to judge the facts fairly, subsequent protestations of open-mindedness on his part cannot restore a presumption of impartiality." ___U.S. App. D.C. at ___, 336 F. 2d 764.

These principles apply here, for just as Chairman Dixon of the Federal Trade Commission was disqualified because "he had in some measure decided in advance that Texaco had violated the Act," ___U.S. App. D.C. at ___, 336 F. 2d at 760, so here, Judge Holtzoff had in some measure decided in advance that appellant's unlawful arrest defense could not succeed. Of course it is true that the court purported to decide

the question as though it were open, but it is perfectly plain from the record that he did not really believe it was open; and having once taken the position that the question was foreclosed, his "subsequent protestations of open-mindedness . . . cannot restore a presumption of impartiality." This deprived appellant of a fair trial for "[n]o matter what the evidence was against him, he had the right to have an impartial judge," Tumey v. Ohio, 273 U.S. 510, 535 (1927); "a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial," Whitaker v. McLean, 73 App. D.C. 259, 118 F. 2d 596 (1941); and "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted:

1. Appellant's conviction should be set aside and all proceedings, commencing with arraignment, nullified for failure to provide counsel at arraignment as required by the Sixth Amendment.

2. Alternatively, the conviction must be set aside and the case remanded for a new trial at which appellant would have opportunity to present his unlawful arrest defense.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,114

CALVIN C. ANDERSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
VICTOR W. CAPUTY,
JOHN R. KRAMER,
Assistant United States Attorneys.

Cr. No. 791-64

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Was appellant denied the right to counsel when he entered a plea of not guilty at his arraignment in the absence of an attorney?

2) Was appellant denied a fair trial because, within slightly over two weeks, his attorney had the opportunity to examine the police officers and call appellant to give testimony twice before two different judges?

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted, tried by jury, convicted, and sentenced to imprisonment for a term of twenty months to five years on one count of selling narcotics not in or from the original stamped package in violation of 26 U.S.C. § 4704(a) and a concurrent term of five years on one count of facilitating the sale of unlawfully imported narcotics in violation of 21 U.S.C. § 174.

On October 9 and 16, 1964, prior to trial, a hearing was held before Judge Matthews on appellant's motion to

suppress the narcotics found on his person. Officer David Poppen of the Thirteenth Precinct testified that at approximately nine o'clock in the evening of July 12, 1964, he and his partner, Officer Paul Porter, came upon ten to twelve men fighting on the west side of the 1900 block of Fourteenth Street, Northwest, in the District (Pretr. 4-6, 13-15).[1] Appellant was in the middle of this group, taking a swing at another man (Pretr. 6-7, 13-17). As the police approached, the group dispersed. While the others took off to the south, appellant ran north, head down, and tried to cross the street, but the traffic blocked his escape (Pretr. 5-6) Officer Porter arrested him for disorderly conduct and asked appellant why he was running (Pretr. 5-6). Appellant replied with an obscenity (Pretr. 5, 7). He was searched on the scene by Officer Porter, who recovered a large brown bag with capsules from appellant's left front pants pocket (Pretr. 8-10). He was transferred by wagon to the precinct where further search by Officer Poppen revealed a brown piece of paper wrapped around fourteen similar capsules in the upper part or band of appellant's trousers and Officer Porter uncovered a cigarette package containing more capsules (Pretr. 10, 14). Officer Porter supported Officer Poppen's description of the sequence of events with more detail (Pretr. 30-38).

Appellant took the stand to dispute the officers' narrative, offering as his version of what transpired the story that he was running along Fourteenth Street to get out of the rain when he was halted by the officers, who asked where he was going and immediately proceeded to search him, arresting him after uncovering the capsules (Pretr. 18-19). Appellant knew of no fight in the area, but remembered the officers deciding to charge him with disorderly conduct to provide probable cause for the search (Pretr. 19-21). Judge Matthews denied the motion to suppress (Pretr. 42).

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[1] The transcript of the hearing will be referred to as Pretr. as distinguished from Tr. or the transcript of the case itself.

At trial some seventeen days later, appellant admitted possession of the narcotics, contesting only the legality of his arrest (Tr. 3, 62-63). Proof of the lack of appropriate tax stamps on the containers of the capsules, the chain of custody of the capsules, and the narcotic drug nature of their contents went unchallenged (Tr. 12-20, 40-43, 50-57).[2] Instead, the entire pretrial hearing testimony was reheard by the trial judge, Judge Holtzoff. The evidence obtained from both officers was almost identical, albeit not verbatim, with the evidence they had given but two weeks before, (Tr. 8-12, 20-28, 30-35, 36-40, 45-46) with additional testimony identifying various exhibits and explaining their custody (Tr. 12-20, 28-30, 40-43, 48-49) and a statement by Officer Poppen, in response to a question not posed at the prior hearing, that appellant claimed he was fighting because someone had placed a knife to his throat (Tr. 40, 44). Appellant also repeated his getting-in-out-of-the-rain tale (Tr. 60-62).

The trial court discredited appellant and believed the officers, finding a legitimate basis for appellant's arrest in the officers' observing him commit a misdemeanor (Tr. 63-64). The judge also noted that, although he had considered the suppression issue as if it were an open matter on the basis of full testimony, he did not think that appellant had a right to retry the same issue (Tr. 64-65).

RULE INVOLVED

Rule 41(e), Federal Rules of Criminal Procedure, provides in pertinent part as follows:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized . . . to suppress for use as evidence anything so obtained . . . . The judge

[2] The brown bag in appellant's pants pocket contained 308 capsules (it was not introduced into evidence), the empty Kool pack 14, the brown paper in the trouser band 28, with one other capsule located in appellant's left front shirt pocket. (Tr. 12, 14, 16, 19-20, 27, 42, 57).

> shall receive evidence on any issue of fact necessary to the decision of the motion. . . . The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

SUMMARY OF ARGUMENT

Appellant was not denied his constitutional right to the assistance of counsel, because no attorney was by his side when he entered a plea of not guilty at his arraignment, no prejudicial impact of this state of judicial proceedings upon his trial having been demonstrated, nor was he denied his constitutional right to a fair trial when he was allowed to waste the court's time by relitigating in full at trial his motion to suppress which had been denied prior to trial after a full hearing, even though the trial judge thought that the previous ruling constituted the law of the case.

ARGUMENT

I. Appellant was not denied his right to counsel.

Appellant contends that he was denied his Sixth Amendment right to the assistance of counsel when he entered a plea of not guilty at his arraignment unrepresented by an attorney. This Court held some three months ago, silently adhering to its still vital and valid decision in *Council* v. *Clemmer*, 85 U.S. App. D.C. 74, 177 F.2d 22, *cert. denied*, 338 U.S. 880 (1949), that a counselless entry of a not guilty plea at the arraignment stage does not necessarily invalidate a subsequent conviction at trial. *Shelton and Pannell* v. *United States*, Nos. 18,793-18,-794, decided February 11, 1965, *cert. denied*, March 26, 1965 (issue of counselless arraignment deemed matter

unworthy of mention in *per curiam* affirmance focusing on lack of counsel at preliminary hearing). Arraignment is not a critical stage in the federal system in the absence of some particularized showing on the record, altogether absent here,[3] that the trial itself was prejudicially affected by the fact that such a plea was entered without counsel. *Shelton and Pannell, supra; Council* v. *Clemmer, supra.* See Rule 10, FED. R. CRIM. P. Compare *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) (loss of certain defenses, important to defendant in case at bar, if not raised at arraignment stage in Alabama, with intelligent plea in that jurisdiction incorporating counselled opportunity to assert all applicable defenses) with *Pointer* v. *Texas*, 33 U.S.L. WEEK 4306, 4307 (U.S. April 15, 1965) (the central issue with respect to reversibility for failure to appoint counsel at a certain stage in course of judicial proceedings is whether procedural circumstances make that stage so critical to defendant).

II. Appellant was not denied a fair trial.

(Pretr. 4-42; Tr. 6-65)

Appellant claims that he was denied his constitutional right to a fair trial because the trial judge expressed the view that another judge's pre-trial denial after hearing of appellant's motion to suppress constituted the controlling rule of the case, binding on him. In light of the record in this case which reveals that the same witnesses and the same testimony were paraded before Judge Holtzoff on November 2 as had been produced before Judge Matthews on October 9 and 16, culminating in the same credibility conflict, appellant's claim essentially is that

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[3] Appellant's abstract essay on the virtues of having a lawyer at arraignment (appellant had one less than two weeks later, on September 17, 1964) is laudable and irrelevant. The only consequence to this case he refers the Court to is his *pro se* admission that the capsules he was found with contained only milk sugar. What effect this unintroduced allegation had when appellant, at trial, admitted possession of narcotics, litigating only the seizure, is a proper subject for a fortune teller.

he has a constitutional right to squander the precious, all-too-limited time of the District Court so that his lawyer may obtain cross-examining and arguing experience.

It is appalling that anyone can seriously argue that such toying with the already overburdened judicial system is a constitutional right. Judge Holtzoff discovered the existence of the previous ruling contrary to appellant some two-thirds of the way through the trial motion (Tr. 44). Despite his opinion that Rule 41(e), FED. R. CRIM. P., does not contemplate retrial of such motions, but rather looks to efficient handling of isolatible, tangential issues (Tr. 45, 47-48, 64-65), a view he had also expressed formally in *United States* v. *Jennings*, 19 F.R.D. 311, 312 (D.D.C. 1956) and *United States* v. *Gatewood*, 109 F. Supp. 440 (D.D.C. 1953), he permitted the witnesses to continue their testimony as to the circumstances surrounding appellant's arrest (Tr. 45-49, 59-63). Appellant's trial counsel never proferred any new pertinent testimony or entered upon any previously unexplored line of questioning.[4] The record blatantly exposes the reasons why he wanted a rehearing before a different judge: he felt he should urge his sole contention throughout the case (no one would deny him his opportunity to renew his objection, only his right to duplicate and thereby waste judicial effort) and he thought he hadn't gone into as much detail before Judge Matthews (Tr. 44, 48).[5] This then is appellant's incredible contention—that counsel has an absolute right successfully to Monday morning quarterback himself and replay the game he has already lost the way he knows in retrospect he ought to have played it.

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[4] The condition of the weather had been fully explored at the first hearing (Pretr. 12, 19—Officer Poppen and appellant) and inquired into at trial (Tr. 23—Officer Porter) as had Officer Porter's prior lack of acquaintance with appellant (Pretr. 23, 37—appellant testified Officer Porter knew him, not Officer Poppen), a matter which was irrelevant vis-a-vis probable cause. *Hutcherson* v. *United States*, No. 18,375, decided March 18, 1965, slip opinion at pp. 6, 8.

[5] No doubt he also hoped another judge might believe his client.

This Court rejected a similar contention in *Jennings* v. *United States*, 101 U.S. App. D.C. 198, 199, 247 F.2d 784, 785 (1957) when the denial of the pre-trial motion had specifically been without prejudice to the movant's production of additional information, which was not the case here. Although the trial court might in its discretion entertain a motion to suppress during the trial after the motion was denied pre-trial, failure to exercise such discretion and treatment of the prior ruling as a final determination without hearing any testimony whatever on the subject is not reversible abuse in the absence either of a proffer to adduce new relevant evidence not previously available at the pre-trial hearing by the exercise of proper diligence or of the presentation of evidence during the course of the trial which makes it probable that defendant's rights were unconstitutionally invaded. *Jennings, supra; Waldron* v. *United States*, 95 U.S. App. D.C. 66, 70, 219 F.2d 37, 41 (1955); *Gatewood* v. *United States*, 93 U.S. App. D.C. 226, 230-231 n. 5, 209 F.2d 789, 793-794 n. 5 (1953); *United States* v. *Whiting*, 311 F.2d 191, 196 (4th Cir. 1962), *cert. denied* 372 U.S. 935 (1963); *United States* v. *Koenig*, 290 F.2d 166, 172-173 n. 10 (5th Cir. 1961), *aff'd* 369 U.S. 121 (1962); *United States* v. *Wheeler*, 275 F.2d 94, 96 (3d Cir.), *cert. denied*, 363 U.S. 828 (1960), *aff'ing*, 172 F.Supp. 278, 279-281 (D. Pa. 1959); *United States* v. *Wheeler*, 256 F.2d 745, 748 (3d Cir.), *cert. denied*, 358 U.S. 873 (1958), *aff'ing* 149 F.Supp. 445 (1957); *United States* v. *Jackson*, 149 F. Supp. 937 (D.D.C. 1957), *rev'd on other grounds*, 102 U.S. App. D.C. 109, 250 F.2d 772 (1957); *State* v. *Mariano*, 152 Conn. 85, 8—, 203 A.2d 305, 309 (1964). See *DiBella* v. *United States*, 369 U.S. 121, 129-130 n. 9 (1962) (noting that usual pre-trial proceeding is decided on the basis of affidavits alone, therefore, final ruling ordinarily reserved until trial); *Nardone* v. *United States*, 308 U.S. 338, 341-342 (1939) (stressing policy in favor of trial dispatch without interruption for auxiliary inquiries that can be disposed of in other ways); *Gouled* v. *United States*, 255 U.S. 298, 312-313 (1920).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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